No. 20-1034

IN THE
Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISACCO JACKY SAADA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

JEFFREY T. GREEN
KATHLEEN MUELLER
JILLIAN S. STONECIPHER
NICOLE M. BAADE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

RICHARD MIN*
MICHAEL BANUCHIS
GREEN KAMINER MIN & ROCKMORE LLP
420 Lexington Avenue
Suite 2821
New York, NY 10170
(212) 681-6400
rmin@gkmrlaw.com

MELISSA A. KUCINSKI
MK FAMILY LAW
1717 K St. NW, Ste. 900
Washington, DC 20006

Counsel for Respondent
*Counsel of Record

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INTRODUCTION

A family court in Italy is preparing to resolve a custody dispute over B.A.S., a boy born and raised in Milan to an American mother and Italian father. B.A.S., however, is currently in the United States after an international child abduction. His mother, petitioner Narkis Golan, brought him to New York to attend a family wedding and did not return him to his home country, where his father, respondent Isacco Jacky Saada, lives. Ms. Golan now seeks to use her relocation of B.A.S. to prevent the Italian court from resolving the custody dispute, even though that court is well-equipped to protect B.A.S. from the grave risk of harm caused by domestic violence.

The Hague Convention on the Civil Aspects of International Child Abduction was adopted and ratified by the United States, Italy, and other countries specifically to address this "problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010). The Convention's "core premise" is "that the interests of children in matters relating to their custody are best served when custody decisions are made in the child's country of habitual residence." *Monasky* v. *Taglieri*, 140 S. Ct. 719, 723 (2020) (cleaned up). The Convention requires signatory nations to "co-operate with each other and promote co-operation" *The Hauge Convention on the Civil Aspects of International Child Abduction*, Art. 7 (Oct. 25, 1980).[1] It also mandates that if a child is wrongfully removed or retained, a court "shall order the return of the child forthwith." Convention, Art. 12. There is an exception to this return mandate if there is a "grave risk" that "return would expose the child to physical or

[1] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

psychological harm," *Id.* at 13(b), but the exception is narrow, and even if it applies, a court still has the power "to order the return of the child." *Id.* at 18.

The district court properly ordered the return of B.A.S. to Italy with measures to ameliorate the grave risk of potential exposure to violence between his parents. Those decisions are based on an extensive record and detailed factual findings that reflect careful consideration for the safety of B.A.S. and respect for the Convention's objective of returning children so custody determinations can be made in the country of their habitual residence. As the district court observed, cases under the Convention are "always heart-wrenching." Pet. App. 83a. While "[c]ourts cannot alleviate the parties' emotional trauma," they "can hope to provide [parents] and their child with a prompt resolution so that they can escape legal limbo." *Id*. at 84a (cleaned up).

Whether there is a grave risk that return will expose the child to physical or psychological harm is a forward-looking inquiry. That inquiry necessarily requires a consideration of the totality of the facts and circumstances the child will face upon return, including any measures that could be taken by the child's parents or authorities in his home country to protect him. In addition, in deciding whether to exercise its discretionary power to return a child even when the grave-risk exception applies, a court must consider whether there are measures that can ameliorate the grave risk. The lower courts properly found that such measures could be, and in fact have been, put in place to avoid the grave risk of harm to B.A.S.

A family court in Milan presiding over the custody dispute between Mr. Saada and Ms. Golan has entered a protective order that requires Mr. Saada to stay away from Ms. Golan and B.A.S., except for supervised

visits between father and son at a neutral location pending disposition of the custody proceedings. The Italian court has also directed a Social Services agency in Milan to conduct an evaluation of B.A.S. and his parents upon his return, and it appointed an attorney to represent B.A.S. and advocate for his best interests in the custody dispute. It would offend the primary objective of the Convention and be inconsistent with our treaty obligations to refuse to return B.A.S. to Italy. A remand, in any event, is not necessary given the extensive record that has been created, and the factual findings that deserve deference.

STATEMENT

Mr. Saada and Ms. Golan met and began a relationship in June 2014. Pet. App. 44a. Ms. Golan moved to Milan to live with Mr. Saada two months later, and they were married the following year. *Id.* 44a–45a. Their only child, B.A.S., was born in Milan in 2016, and spent the first two years of his life living with his parents there. *Id.* 45a–46a.

In July 2018, Ms. Golan took B.A.S. to the United States to attend her brother's wedding in New York. *Id*. at 47a. Ms. Golan did not return to Milan in August 2018 as scheduled. Instead, she remained in New York with B.A.S. *Id.*

Mr. Saada promptly initiated actions in Italy and the United States seeking the return of his son. He filed a criminal kidnapping complaint and initiated civil proceedings against Ms. Golan in Italy seeking sole custody of B.A.S. from an Italian court. *Id.* at 48a.

In the United States, Mr. Saada filed this lawsuit in September 2018, seeking the return of B.A.S. under the Hague Convention and the International Child Abduction Remedies Act (ICARA), 22 U.S.C, §§ 9001–90011. Pet. App. 41a, 48a. He also sought to visit with

B.A.S. in the United States, but Ms. Golan refused, alleging that his visits would pose a "physical and psychological danger to her child and herself." 2d Cir. J.A. 140 (21-876).

At an October 2018 hearing, the district court said it did not "know enough about what the situation is," but said it would allow "some kind of supervised visitation." 21-876 J.A. 140–41. The parties later negotiated for Mr. Saada to have extensive supervised visitation with B.A.S. in the United States during the adjudication of his petition. Pet. App. 42a n.1; see also Joint App. 90 (detailing multiple visits); D. Ct. ECF No. 106 at 2; *id*. 106.1.

On January 7, 2019, the district court commenced a nine-day bench trial that included 11 fact witnesses (including Ms. Golan and Mr. Saada), and seven experts. Pet. App. 42a. The evidence addressed both the allegations that return to Italy would pose a grave risk to B.A.S. and possible ameliorative measures to avoid any such risk.

On March 22, 2019, the district court ordered the return of B.A.S. to Italy, "subject to certain conditions to ensure [his] safety." *Id*. The opinion began with detailed findings of facts.

The court found that "the parties' relationship was turbulent from its inception, characterized by loud arguments and violence" *id*. at 43a; see also *id*. 50a–64a (describing incidents). Mr. Saada was the perpetrator of the large majority of violence between the parties, though Ms. Golan conceded to abusing him as well. *Id*. at 49a.

The court found that this violence posed a risk to B.A.S., who could be harmed by observing the abuse. *Id*. at 80a. But B.A.S. was not "himself the target of violence." *Id*. 79a–80a n.37. The court found it

"significant" that Ms. Golan's actions revealed that she "did not see Mr. Saada as a threat to B.A.S; she frequently left B.A.S. with [him] while she ran errands or socialized with friends," and testified that she "wants [him] to have a relationship with B.A.S." *Id.*; see also *id*. at 50a (same).

The licensed social worker who supervised Mr. Saada's visits with B.A.S. in the United States testified that B.A.S. and Mr. Saada "seemed happy together, that their relationship appeared to be loving, and that B.A.S. did not seem to be at all afraid of [him]." *Id*. 64a–65a. A psychologist who conducted clinical interviews with Mr. Saada and observed his interactions with B.A.S. reported that father and son had a "vibrant bond" and exhibited "affectionate behavior toward one another"; that Mr. Saada "was appropriate with his son, related to him gently"; and was "attuned to his child and his needs." J.A. 100, 127, 131–32.[2]

The court's factual findings included Italy's ability to protect victims of abuse, specifically that "orders of protection are available to domestic violence victims," and there is a specialized center in Milan with "psychologists, social workers, doctors, and lawyers to assist victims of domestic violence, and provide free legal advice." Pet. App. 70a.

The court further found that the Milan police had responded in April 2017 when Ms. Golan called them to the family residence after a domestic dispute. *Id*. 56a–57a. The police "interviewed the parties separately,"

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[2] The court credited the testimony of this psychologist, finding he "provided the clearest and most objective evaluation of the parties' relationship, and the potential risks to B.A.S," while Ms. Golan's expert was "more of an advocate . . . than an objective evaluator." Pet. App. 68a.

and asked Ms. Golan if she would like to go to a hotel. *Id.* at 57a. She declined. *Id.* The police referred the matter to Milan Social Services, which conducted a months-long investigation and issued a report recommending educational intervention and "couple psychotherapy" to address the "dynamics of the conflict" between them that "culminate[s] in reciprocal acts of violence, both physical and psychological …." *Id.* 57a–59a. Social workers offered to place Ms. Golan in a safe house, but she refused. *Id.* at 58a.

The court then applied its findings to the Convention framework. It found that Italy was B.A.S.'s country of habitual residence and that Ms. Golan had wrongfully retained B.A.S. in the United States. *Id.* 72a–77a. It further found that return to Italy would pose a grave risk of harm to B.A.S. *Id.* 77a–80a. While the court "d[id] not agree that B.A.S. was himself the target of violence," *Id.* 79a–80a n.37, it found that "a child who is exposed to domestic violence, even though not a target of abuse, could face a grave risk of harm." *Id.* at 80a.

The court also considered whether there were ameliorative measures that "could protect B.A.S. 'while still honoring the important treaty commitment'" to return him to Italy for Italian courts to determine his custody. *Id.* at 81a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 248 (2d Cir. 1999) (*Blondin I*)). The court rejected Ms. Golan's contention that "there are no steps that would protect B.A.S. and no way to ensure that Mr. Saada would comply with them." Pet. App. 81a.

First, the court found that Ms. Golan and Mr. Saada would not live together in Italy, and "eliminating the element of proximity will reduce the occasions for violence." *Id.* at 82a. Second, Mr. Saada agreed to undertakings that would "ameliorate the grave risk to B.A.S. posed by [his] abusive behavior to Ms. Golan." *Id.*

Mr. Saada agreed to give Ms. Golan $30,000 before B.A.S. is returned, so she could return with B.A.S. and "have enough money for an apartment that she chooses, without Mr. Saada or his family knowing of its location, during the course of the Italian custody proceedings." *Id*. 82a–83a. Mr. Saada would stay away from Ms. Golan until Italian courts addressed the custody issue, seek dismissal of criminal kidnapping charges, and begin cognitive behavioral therapy. *Id*. at 84a. In addition, Mr. Saada was required to assist Ms. Golan with obtaining legal status in Italy and provide the record of the district court proceeding to the Italian court presiding over the custody proceeding. *Id*.

Ms. Golan appealed. On July 19, 2019, the Second Circuit affirmed the finding that Ms. Golan wrongly removed B.A.S. from Italy. *Id*. 27a–28a. But it reversed and remanded the return order because the "most important protective measures"—specifically, Mr. Saada's promise to stay away from Ms. Golan and to visit B.A.S. only with her consent—were "unenforceable and not otherwise accompanied by sufficient guarantees of performance." Pet. App. 27a–28a, 35a.

The court said that on remand the district court "may consider whether it is practicable at this stage of the proceedings to require one or both of the parties" to seek a protective order or supervised visitation order from Italian courts. *Id*. at 38a. In addition, the court could request assistance from the State Department, which could communicate with the Italian government "to ascertain whether it is willing and able to enforce certain protective measures." *Id*. 38a–39a.

On remand, the district court immediately ordered Ms. Golan to "take the necessary steps to secure [a] protective order [in Italy] before August 10, 2019." D. Ct. ECF No. 69 at 2. It also used the International

Hague Network of Judges to contact the Italian Central Authority. D. Ct. ECF No. 78.

On October 4, 2019 the Italian Central Authority responded to the district court, confirming that Italian courts can "issue protection orders" and that "any protection measure [could] be adopted even before the return of the child to Italy with his mother." D. Ct. ECF No. 85 at 2. The Italian Central Authority added that "should the U.S. Judge inform about the date and place of the child's return, we will address the Court of Milan in view of taking steps ahead of time so as to make protection measures effective and immediately enforceable."[3] *Id.*

Ms. Golan, however, delayed in seeking a protective order. In October 2019, she argued that the issue "was not yet ripe" because, in her view, the Italian court could not "confirm the contours of needed protections" without a translation of the district court record—a translation she insisted that Mr. Saada pay for.[4] D. Ct. ECF No. 82 at 1–2.

In November 2019, the district court again ordered the parties to "submit a stipulated protective order to the Italian court," noting that Mr. Saada had already

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[3] The district court then sent another letter, asking additional questions, including about the time it would take to get a protective order. D. Ct. ECF No. 86 at 1–2. The Italian Central Authority responded in a letter dated November 12, 2019, confirming that the parties could submit an agreed order to the Italian court and that "such orders shall be delivered forthwith and shall be immediately enforceable." D. Ct. ECF No. 88 at 1.

[4] It would have cost over $100,000 to transcribe the entire record. D. Ct. ECF No. 94 at 4. But Mr. Saada agreed to pay for translations of specific documents requested by the Italian court. *Id.*; D. Ct. ECF No. 100 at 9. The district court agreed that the "Italian court is more than capable of deciding which parts of the record should be translated." Pet. App. 18a n.6.

"represented that he would stipulate to an order of protection that would require him to stay away from [Ms. Golan] and B.A.S. during the pendency of the Italian custody proceedings." D. Ct. ECF. No. 89 at 2.

Ms. Golan, however, wanted a broader protective order. D. Ct. ECF No. 92 at 1–2; D. Ct. ECF No. 93 at 2. On December 10, 2019, she asked the Italian court for a protective order extending to Mr. Saada's family members and lasting for "a minimum of one year." D. Ct. ECF No. 94 at 1; D. Ct. ECF No. 94-1 at 7–8. To avoid further delay, Mr. Saada did not contest the application. D. Ct. ECF No. 94 at 2; D. Ct. ECF No. 94-1 at 3.

The Italian court issued a protective order seven days after Ms. Golan requested it. D. Ct. ECF No. 96 at 1; D. Ct. ECF No. 96-1. The order did not cover Mr. Saada's family, but did include "a protective order against [him] and an order directing Italian social services to oversee his parenting classes and behavioral and psychoeducational therapy." Pet. App. 17a. Although it allowed B.A.S. to live with Ms. Golan, the order entrusted him to Milan Social Services and required, upon B.A.S.'s return, a "psycho-social investigation into the family unit" including an assessment of the "parental suitability" of both parents and "parent support interventions" for both parents. D. Ct. ECF No. 96-1 at 9–11. The order also required that visits between Mr. Saada and B.A.S. be supervised. C.A. App. 563; D. Ct. ECF No. 96-1 at 11.

Meanwhile, in the district court, the parties could not resolve their dispute about the amount of money needed for B.A.S. to return to Italy and reside with Ms. Golan until the custody dispute is resolved. Ms. Golan argued that Mr. Saada should have to pay approximately $200,000 to cover not only housing and living expenses for her and B.A.S., but also such things as

therapy for her, tuition for a bilingual private school for B.A.S., treatment for B.A.S.'s alleged special needs, private health insurance, and vacations to visit family in the United States and Israel. D. Ct. ECF No. 94 at 3; D. Ct. ECF No. 95 at 7–8; see also D. Ct. ECF No. 103 at 17–19. Mr. Saada replied that $60,000 would cover her housing and living expenses pending resolution of the custody dispute, and the other items were not necessary to ameliorate the grave risk from B.A.S.'s return and were for the Italian court to resolve in the custody proceeding. D. Ct. ECF No. 106 at 8–10.

On May 5, 2020, the district court issued another return order, finding it was "confident that the Italian courts are willing and able to resolve the parties' multiple disputes, address the family's history and ensure B.A.S.'s safety and well-being." Pet. App. 13a The court found that the record "does not support" Ms. Golan's claim that Mr. Saada "will not follow the orders of the Italian court because he is untrustworthy." *Id.* at 20a. It also ordered Mr. Saada to pay Ms. Golan $150,000 before she returns to Italy—an amount that will "ensure B.A.S.'s safe and comfortable return to Italy, as well as [Ms. Golan's] financial independence from [Mr. Saada] and his family." Pet. App. 22a–23a.

Ms. Golan again appealed the return order. The Second Circuit affirmed, holding that the district court "correctly concluded" that there are "sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S. upon his return to Italy." Pet. App. 9a.

Ms. Golan filed a petition for rehearing to the Second Circuit, which was denied. Pet. App. 86a. Ms. Golan then filed a Rule 60(b)(2) motion to vacate the judgment, which the district court denied as an unwarranted request "to undo months of intercession and the implementation of protections by the Italian courts, as

well as undertakings by the parties . . . ." D. Ct. ECF No. 130 at 8. The Second Circuit affirmed after another appeal from Ms. Golan, but stayed the return order pending this Courts' ruling. D. Ct. ECF No. 134 (Apr. 21, 2021) and 142.

This Court granted review in December 2021. Thereafter the Italian court appointed an attorney to represent B.A.S. in the custody proceedings, ordered B.A.S.'s attorney and the parties to file statements by February 28 and May 31, respectively, and scheduled a hearing on June 9, 2022 with the intention to make a final decision in the near future.

SUMMARY OF ARGUMENT

Consideration of ameliorative measures as part of a grave-risk analysis tracks the text and purpose of the Convention, whose central operating feature is the return remedy. In furtherance of this overarching purpose, the Convention's exceptions are meant to be narrow and courts maintain the discretion to return a child even where the grave-risk exception or another exception to the return requirement exists. In both its analysis of the grave-risk exception and its exercise of this discretion, courts should consider all relevant evidence and circumstances concerning the environment in which a child would be returned home. This includes not only evidence that establishes a grave risk but any evidence that could mitigate that risk, such as potential ameliorative measures. This approach harmonizes Article 13(b)'s concern that a child be protected from a grave risk of harm with the treaty commitment to return the child, and ensures that the return requirement does not become a "dead letter" in practice. See *infra*, at p. 40.

Consideration of ameliorative measures need not violate the Convention's goal of securing the prompt

return of the child. The evidence relevant to considering ameliorative measures will also be relevant to the grave-risk finding and can therefore be presented together early in the proceedings as suggested by the Hague Conference. Judges can also use the International Hague Network of Judges to save time and obtain information about the protections available in the child's home country. See *infra*, at p. 22.

Consideration of ameliorative measures does not require a U.S. court to make as part of a return order a custody determination that the home country should make. A return order is merely a provisional remedy to allow the child's safe return until the courts in the home country can resolve the custody dispute. It is not, and as Article 19 states, "shall not be taken to be[,] a determination of the merits of any custody issue." See *infra*, at p. 24.

Consideration of ameliorative measures is not inconsistent with the Convention's goal of protecting the best interest of the child. The Convention presumes that it is in the child's best interest to have custody determinations made in the country of habitual residence. When there are ameliorative measures that can eliminate a grave risk and allow the safe return of the child, the child's best interests are protected. See *infra*, at pp. 25–26.

A requirement that courts consider whether sufficient ameliorative measures exist to mitigate a grave risk of harm upon return is not a requirement that ameliorative measures must be imposed and the child returned in every case. It means only that when measures are available to ameliorate the grave risk, the child should be returned. See *infra*, at p. 26.

In all events, there is no basis in law or fact for holding that ameliorative measures will seldom be

appropriate in cases of domestic violence. That legal rule would reflect a bias in favor of U.S. courts and a distrust of courts and authorities in other signatories that is antithetical to the trust and respect that must be given to fellow signatory nations. Nor is it always true that the court will have to take extraordinary steps to ensure that the child is protected from abuse upon return. In this case, for example, the district court found no evidence that B.A.S. would be unsafe with Mr. Saada, and it said that his return to Italy was not necessarily contingent on Ms. Golan's return. See *infra*, at p. 28.

The State Department has long supported consideration of ameliorative measures in grave-risk cases. In fact, the United States endorsed considering ameliorative measures in *Blondin* v. *Dubois*—the precedent the district court cited in considering whether ameliorative measures could eliminate the grave risk to B.A.S. See *infra*, at pp. 29–30.

International practice also supports consideration of protective measures in a grave-risk analysis. Congress intended for U.S. practice to follow international practice. The Hague Conference on Private International Law's *Guide to Good Practice* instructs that courts should consider whether there are measures that will protect children from grave risk of harm and permit their return to their country of habitual residence. This *Guide* was drafted by an international Working Group composed of judges, Central Authorities, cross-disciplinary experts, and private practice attorneys, including representatives from the United States. The practice of our sister signatories also supports consideration of ameliorative measures to mitigate risk and facilitate the child's return. See *infra*, at pp. 32, 37–38.

The district court's return order should therefore be affirmed. Ms. Golan's request to reverse the return

order and allow B.A.S. to remain in the United States because it is inappropriate to use ameliorative measures in cases of domestic violence generally, and for B.A.S. in particular, is not properly before the Court. It is outside the scope of the question presented in the petition for certiorari and is not an argument advanced in the petition. Instead, the petition argued that if this Court were to conclude that courts need not consider ameliorative measures, the appropriate remedy would be to remand the case for the district court to exercise its discretion to decide whether to return B.A.S. with such measures. See *infra*, at p. 35.

In all events, B.A.S. should have been returned to Italy years ago, and there is no valid reason to reverse the return order to remand this case for further proceedings. Ms. Golan contributed to the delay here and asked the district court to include conditions in the return order that extended well beyond what was necessary to ameliorate any grave risk to B.A.S. Furthermore, the Italian court presiding over the custody proceedings has already issued a comprehensive order to protect B.A.S. and Ms. Golan upon their return. The court has appointed an attorney to represent B.A.S.'s interests in the custody dispute, and a hearing is set for June 9. The grave risk to B.A.S. has been ameliorated, and it would violate the Convention and be an affront to the Italian court to refuse to return B.A.S. to Italy immediately. See *infra*, at pp. 43–44.

ARGUMENT

I. COURTS ARE REQUIRED TO CONSIDER AMELIORATIVE MEASURES AS PART OF A GRAVE-RISK ANALYSIS

A. Consideration of Ameliorative Measures in a Grave-Risk Analysis Tracks the Text and Purpose of the Convention

1. The district court's careful consideration of the record and its decision to order the return of B.A.S. to Italy for resolution of the custody dispute did not violate the Convention. In considering whether there is a grave risk that return would expose B.A.S. to physical or psychological harm, the court properly considered the totality of the circumstances that B.A.S. would face upon return—the circumstances that would create a risk of harm and the measures that would ameliorate that risk. To claim, as Ms. Golan does, that relevant ameliorative measures can be excised from a court's analysis because the underlying issue is domestic violence, is to undermine the Convention framework for returning children for custody determinations in their home country.

2. A treaty should be interpreted to "giv[e] effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). A proper interpretation "begin[s] with the text of the treaty and the context in which the written words are used." *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1508–09 (2017). This Court also considers "the negotiation and drafting history of the treaty." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008).

The Convention's objective is twofold: (a) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (b) "to ensure that rights of custody and of access under the law

of one Contracting State are effectively respected in the other Contracting States." Convention, Art. 1. It "provides a sound treaty framework to help resolve the problem of international abduction and retention of children" and is meant to "deter such wrongful removals and retentions." 22 U.S.C. § 9001(a)(4). To implement this purpose, the Convention establishes, as its "central operating feature," *Abbott*, 550 U.S. at 9, a return remedy for parents whose children are "wrongfully removed or retained" in violation of their "rights of custody" under the law of the country of the child's habitual residence. A parent may file a petition with a court in the country where the child was taken, and if the court finds that the child was "wrongfully removed or retained," it must "order the return of the child forthwith." Convention, Art. 12.

Article 13 creates several exceptions to the return requirement. The exception at issue states that a court "is not bound to order the return of the child" if the person opposing the return establishes that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention, Art. 13(b). Congress has emphasized that this exception is "narrow." 22 U.S.C. § 9001(a)(4).

3. The text of Article 13(b) makes clear that the grave-risk analysis is a "forward-looking" inquiry, that requires a consideration of the facts and circumstances the child would face upon "return." Hauge Conf. on Private Int'l Law, *1980 Child Abduction Convention: Guide to Good Practice: Part VI, Article 13(1)(b)* ¶ 36. See *Baran* v. *Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) ("the district court was not required to find [the child] had previously been physically or psychologically harmed; it was required to find returning him to Australia would expose him [to such

harm].”). Although the circumstances that existed before the child’s abduction may be relevant to this inquiry, the court must also consider whether the child will face different circumstances upon return.

It is therefore appropriate—and indeed necessary—for the court to consider ameliorative measures, including undertakings or agreements by the parents, or measures that could be put in place in the child’s home country, to provide a safe return for the child pending the ability of courts in that country to make their own custody determination. See, *e.g.*, *Gaudin* v. *Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005) (“Necessarily, the ‘grave-risk’ exception considers, inter alia, where and how a child is to be returned”) (quoting *Walsh* v. *Walsh*, 221 F.3d 204, 219 n.13 (1st Cir. 2000) (acknowledging that it may pose a grave risk “to return the child to the precise status quo ante, but it may not pose a grave risk to return the child” if those risks are “lessened or eliminated by the trustworthy undertakings of the parties”)). Thus, the determination of whether there are measures that will reduce the risk of harm upon return “is inseparably bound up with the question [of] whether a grave risk . . . exists in the first place.” *In re ICJ*, 13 F.4th 753, 765 (9th Cir. 2021) (quoting *Gaudin*, 415 F.3d at 1036).

4. Moreover, Article 13 does not *prohibit* a court from returning a child *after* it finds there is a grave risk that return would expose the child to harm. It provides only that the court “is *not bound*” to return the child. Convention, Art. 13 (emphasis added)—thereby freeing the court to exercise its discretion, based upon all the facts and circumstance pertinent to the particular case. In other words, the Article 13 exceptions give “judges a discretion—and do[] not impose upon them a duty—to refuse to return a child.” Elisa Pérez-Vera, *Explanatory Report* ¶ 113 (Translation of the

Permanent Bureau, 1982);[5] see also *Lozano* v. *Montoya-Alvarez*, 572 U.S. 1, 21 (2014) (Alito, J., concurring) ("[A] court has discretion to order return even where such return poses 'a grave risk' of harm or threatens to place the child in an 'intolerable situation' . . . ."); *Hague International Child Abduction Convention Text and Legal Analysis*, 51 Fed. Reg. 10494, 10509–10 (Mar. 26 1986) (same).

The district court's discretion, however, is not unbounded. A motion to a court's "discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (1807) (Marshall, C. J.)). It is fundamental that "limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139. Thus, even when there are no "express legislative restrictions" on the court's exercise of discretion, this Court has imposed limits based on the objectives of the statute conferring that discretion. *Id.* 139–41 (citing cases). The same principle should apply to the Convention. In deciding whether to return a child despite a grave risk finding, a court must make a reasoned decision consistent with the objectives of the Convention.

5. The United States agrees that courts must consider whether, given the Convention's objectives, "a child's return is appropriate in the face of a grave risk of harm." U.S. Merits Br. 25; see also *id.* at 30. Given "the totality of the circumstances before it," *id.* at 29, a court should consider "whether there are countervailing factors that would nevertheless render return

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[5] https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf

appropriate," *id.* at 24. The United States admits that a "court may take into account existing or potential ameliorative measures that might reduce the grave risk of harm." *Id.* at 15; see also *id.* at 29. But the United States and Ms. Golan maintain that there is "no requirement that a court must always consider such measures." *Id.* 15–16; see also Pet. Br. 20–23 (similar argument from Ms. Golan).

Ms. Golan and the United States point to the last sentence of Article 13, which states that in "considering the circumstances referred to in [this] Article," courts "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Pet. Br. 22; U.S. Merits Br. 15. But it is illogical to conclude that this provision means that courts need not consider any other information. Article 13 requires courts to assess multiple complicated "circumstances," including whether the child will face a grave risk of harm upon return, whether the left-behind parent was exercising custody rights when the child was abducted, and whether the child has "attained an age and degree of maturity at which it is appropriate to take account of its views." Convention, Art. 13. The language relied upon by Ms. Golan and the United States is simply about comity: courts in another country shall take into account what authorities in the child's habitual residence have to say about the matter. It cannot be that courts need only consider information from the Central Authority about the child's "social background" and may disregard all other relevant information, including that

provided by the parties. Nor would such a limitation aid Ms. Golan here.[6]

6. Consideration of measures that would reduce the risk of harm a child would face upon return is an essential part of a thorough analysis of the grave-risk exception, and a proper exercise of discretion in such cases, especially where, as here, the left-behind parent is amenable to the imposition of such measures to obtain the return of the child. Ameliorative measures brought to a court's attention are part of the circumstances before the court and must be included in any totality of the circumstances review.

It would frustrate the Convention's central purpose, and the congressional findings and declarations in the implementing statute, for a court to refuse to return a child if measures exist, or could reasonably be put in place, to avoid the grave risk. See *Blondin* v. *Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) (A court "should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention." (quoting *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996))).

As the *Explanatory Report* explains, for the Convention to work in practice, and not become a "dead letter," courts in signatory states must recognize that "they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and

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[6] As noted, the Italian authorities have demonstrated their willingness to protect B.A.S. and Ms. Golan and their preparedness to determine custody. *See supra*, at pp. 5–6, 9.

access." *Explanatory Report* ¶ 34. A "systematic invocation of the [Convention's] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." *Id*.

Congress agreed, finding that "only concerted cooperation pursuant to an international agreement can effectively combat this problem." 22 U.S.C. § 9001(a)(3). A requirement that courts consider ameliorative measures in grave-risk cases also advances Congress's intent that the grave-risk exception remains a "narrow" exception to the Convention's return rule. 22 U.S.C. § 9001(a)(4).

The Second Circuit was therefore right to hold that "it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation." *Blondin*, 189 F.3d at 248. That approach harmonizes Article 13(b)'s grave-risk concerns with the treaty commitment to return the child to their home country, which will resolve custody disputes and "decide what is in the child's best interest[]." *Abbott*, 560 U.S. at 20; see also *Monasky*, 140 S. Ct. at 723.

7. Ms. Golan's counter-arguments are not well-founded.

a. A duty to consider ameliorative measures need not violate the Convention's goal of securing the prompt return of the child. Ms. Golan claims that courts cannot assess the efficacy of ameliorative measures "without first knowing the dimensions of the abuse, which will slow down proceedings." Pet. Br. 24 (quoting

Roxanne Hoegger, *What If She Leaves?—Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 Berkeley Women's L.J. 181, 201 (2003)). But the court will already be hearing evidence on the dimensions of the abuse. For the grave-risk exception to apply, the person who opposes the return of the child must show, "by clear and convincing evidence," 22 U.S.C. § 9003(e)(2)(A), that "the risk to the child is grave, not merely serious." *Hague International Child Abduction Convention Text and Legal Analysis*, 51 Fed. Reg. at 10510.

As a result, cases in which the grave-risk exception is raised are fact-intensive and can take some time for courts to resolve. The hearing on the grave-risk issue is likely to include evidence, often from experts, about the nature and frequency of the alleged abuse, the severity of the harm it would cause, and the ability of the home country to protect the child from it. See, *e.g.*, *Souratgar* v. *Lee*, 720 F.3d 96, 103–04 (2d Cir. 2013); *Simcox* v. *Simcox*, 511 F.3d 594, 607–08 (6th Cir. 2007).

It should not add any material delay for the court also to assess "the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk." *Guide*, ¶ 45; see, *e.g.*, *Sabogal* v. *Velarde*, 106 F. Supp. 3d 689 (D. Md. 2015) (order returning the children conditioned on undertakings by the father was issued three months after the return petition was filed, where the court held a four-day bench trial with fact and expert witnesses about the father's psychological abuse of the children and their mother, heard testimony about Peruvian law, and requested post-trial briefing on possible undertakings to ameliorate the risk). Here, in fact, the district court considered whether there was a grave risk and

potential ameliorative measures in the same trial and issued a return order in six months. Delay was caused by the unusual circumstance that the Second Circuit remanded the case and by Ms. Golan's delay on remand. See *infra*, at p. 40.

Beyond the information provided by the parties, courts can also use the International Hague Network of Judges to obtain information about "the situation and legal implications" facing the child in the country of habitual residence and how protective orders can be obtained or private undertakings enforced. Convention. Hague Conf. on Private Int'l Law, *Direct Judicial Communications* 7, 12 (2013)[7]. The Network was established to facilitate communication between judges in signatory states to "assist in ensuring the effective operation" of the Convention. *Id.* at 6. As the government explains, its use can "result in considerable time savings and better use of available resources." U.S. Merits Br. 26 (quoting *Direct Judicial Communications*, *supra*, at 7).

b. A duty to consider ameliorative measures does not require a court to decide "custody-related issues that are appropriately the province of foreign courts." Pet. Br. 25.

Ms. Golan's concern is with Article 13(b) generally, not ameliorative measures. There is an unavoidable overlap between the issues that courts decide in assessing grave-risk allegations and in custody proceedings: the grave harm that a child allegedly will suffer if he is returned to his home country is plainly relevant to the issues of who should have custody of the child and under what conditions. But that does not make the grave-risk finding—or measures to ameliorate it so the

[7] https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf

child can be safely returned—an improper decision "on the merits of rights of custody." Convention, Art. 16.

Rather, a court's return order is "provisional." Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U. C. Davis L. Rev. 1049, 1054 (2005). It "does not dispose of the merits of the custody case" or otherwise bind the home court to make any particular custody determination. *Id.*; see also Convention, Art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.") A return order simply returns the child to his home country for "additional proceedings on the merits of the custody dispute." Silberman, *supra*, at 1054. As long as any ameliorative measures in the return order are limited to assuring the child's safety until a court in his home country can take up the custody dispute and enter its own orders to protect him, they do not fun afoul of the Convention.[8]

That some measures may intrude too far into custody-related matters does not mean that courts need not consider ameliorative measures in the first place. Ms. Golan incorrectly says that "ameliorative measures" are also known as "undertakings," Pet. Br. 10, and then cites the State Department's concern with some "undertakings" that place an onerous burden on left-behind parents or address matters more appropriately resolved in custody proceedings, to argue that courts need not consider "ameliorative measures," *id.* 24–25. In fact, "courts use the term 'undertaking' to refer to a promise by the petitioning parent 'to alleviate specific dangers that might otherwise justify

[8] Ms. Golan acknowledges that "the Italian order is subject to modification at any point." Pet. Br. 45. Therefore, the Italian courts are empowered to make the ultimate determination as to the best interests of the child.

denial of the return petition. Typical undertakings concern support, housing and the child's care pending resolution of the custody contest.'" *Blondin* v. *Dubois*, 238 F.3d 153, 159 n.8 (2d Cir. 2001) (quoting Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 Fam. L.Q. 35, 52 n.41 (1994)); see also *Guide,* glossary (similarly defining "undertaking" as a "voluntary promise, commitment or assurance . . . to a court to do, or not to do, certain things"). The term "ameliorative measures" or "protective measures" is broader, and includes already "existing services, assistance and support" such as "legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance" and "responses by police and through the criminal justice system." *Guide*, ¶ 43. It also includes "mirror orders"—identical or similar orders made by the courts in both the country where the child was abducted and the home country—and "safe harbor orders"—orders issued by the courts of the home country with safeguards to allow the child to be returned. James D. Garbolino, *The Use of Undertakings in Cases Arising Under the 1980 Hague Convention of the Civil Aspects of International Child Abduction*, Fed. Judicial Ctr. 9–10 (Mar. 2016)[9].

c. A duty to consider ameliorative measures is not inconsistent with the "purpose of protecting the best interest of the child." Pet. Br. 25. Instead, it harmonizes the grave-risk exception's concern for the child's safety with the Convention's broader guiding principle "that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 560 U.S. at

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[9] https://www.fjc.gov/sites/default/files/2016/Use%20of%20Undertakings_0.pdf

20. The purpose of ameliorative measures is to allow courts to both secure the return of the child, which is itself in the child's best interest, and ensure the child's safety from any grave risk.

Furthermore, the Convention's drafters were careful not to allow courts to use their own assessments of a child's best interests as an excuse to avoid returning a child under the Convention. They rejected the argument that "the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests." *Explanatory Report*, *supra*, at ¶ 20. They did so because it was "by invoking 'the best interests of the child'" that courts had often imposed their "value judgments upon the national community from which the child ha[d] been recently been snatched" and had "finally awarded the custody in question to the person who wrongfully removed or retained the child." *Id*. at ¶ 22.

8. A requirement that judges must consider whether there are measures that will mitigate the grave risk and allow the return of the child is not a requirement that ameliorative measures must be imposed and the child returned in every case. There may be cases when ameliorative measures will not eliminate the grave-risk the child would face upon return. See, *e.g.*, *Walsh* v. *Walsh*, 221 F.3d 204, 221 (1st Cir. 2000) (abusive parent has "history of violating orders issued by any court"); *Taylor* v. *Taylor*, No. 10-61287-CIV-JORDAN, 2011 WL 13175008, at *10 (S.D. Fla. Dec. 13, 2011), *aff'd*, 502 F. App'x 854 (11th Cir. 2012) ("no valid undertakings exist" where the risk arises from "unidentified third parties acting unlawfully outside of the legal system" who may harm the child). But when ameliorative measures are available and the child can be returned without a grave risk, the child should be returned.

9. In all events, nothing in the text or purpose of the Convention supports Ms. Golan's claim that "ameliorative measures will almost never be appropriate in the domestic-violence context." Pet. Br. 42. There is no basis in the text or purpose of the Convention for treating domestic violence differently from any other source of a grave risk.

First, Ms. Golan's skepticism that foreign courts can provide adequate protection to victims of domestic violence, Pet. Br. 41–42, offends the respect U.S. courts are required to accord fellow Convention signatories. Using this case as an example, Ms. Golan speculates that Mr. Saada will violate the protective order issued by the Italian court, or the Italian court will lift the order and place B.A.S. at risk of harm. *Id.* 45–46. But the district court found the record "does not support" Ms. Golan's claim. Pet. App. 20a; *id.* 20a–21a (describing evidence supporting conclusion that Mr. Saada will obey the protective order, that "the Italian legal system is capable of handling domestic violence cases involving children," and that "the Italian court will protect B.A.S."); see also *id.* at 10a (affirming district court's findings).

Ms. Golan's refusal to accept those findings reflects a bias in favor of U.S. courts and a distrust of Italian courts that is antithetical to the Convention. The signatories agreed that "the interests of children are paramount in matters relating to their custody." Convention, Preamble. If U.S. courts presume that Convention signatories will not make and enforce custody orders that protect children from harm, they will set a precedent that, if followed by other signatories, would weaken the Convention and make it harder for parents in this country to obtain the return of children who are wrongfully removed from the United States. See Br. For *Amicus Curiae* United States, at 25 ("*Blondin*

Amicus Br."), *Blondin* v. *Dubois*, No. 00-6066 (2d Cir. May 8, 2000)[10]; see also Pet. App. 70a (noting that Ms. Golan's expert testified that the United States "had flaws in [its] system[]" for addressing domestic violence).

Second, Ms. Golan is wrong that in cases of domestic violence, "ameliorative measures will necessarily involve custody-related issues because the child's safety hinges on the custody arrangement—specifically, on ensuring that the child is not in the sole custody of, and is appropriately protected from, the abusive parent." Pet. Br. 39. That is not "necessarily" true in all cases, or even in this one. The district court did not find that B.A.S. must be in Ms. Golan's custody to be safe. Pet. App. 13a. Rather, it is the proximity between Ms. Golan and Mr. Saada that the district court found poses a risk to B.A.S. *Id.* Reducing that proximity is not a "custody-related issue." As the district court found:

> There is no evidence in the record that [Mr. Saada] was abusive to B.A.S. or that B.A.S. would be unsafe with [Mr. Saada]. In fact, [Ms. Golan] frequently left B.A.S. with [Mr. Saada] when she lived in Italy. (See Tr. 536:18, 618:7-15, 1036:21-1037-19, 1042:13-18.) Accordingly, B.A.S.'s return to Italy is not necessarily contingent on [Ms. Golan] also living there.

Pet. App. 16a n.4.

It was only because Ms. Golan intends to return to Italy with B.A.S. that a grave risk of harm would be present and therefore measures taken to "ameliorate the grave risk of harm resulting from [B.A.S.'s]

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[10] https://2009-2017.state.gov/documents/organization/6260.doc

parents' violent relationship" by having a protective order in place that "prohibits [Mr. Saada] from going near [Ms. Golan] or B.A.S." *Id.* 19a–20a. The district court's return order does not resolve the underlying custody dispute. It is a provisional remedy that allows B.A.S. to return safely to Italy with his mother pending resolution of the active custody proceeding now occurring in Italy.

B. The State Department Has Long Supported Consideration of Ameliorative Measures in Grave-Risk Cases

The State Department has long supported the use of ameliorative measures to facilitate the prompt return of the child and "help to minimize the issuance of non-return orders based on Article 13."[11] Furthermore, the United States previously endorsed the Second Circuit's approach in *Blondin* v. *Dubois*—the precedent the district court cited in considering whether ameliorative measures could eliminate the grave risk to B.A.S. See Pet. App. 81a.

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[11] U.S. Dep't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, 17 (2007) ("2007 Compliance Report"); see also U.S. Dept't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, 28 (2009) ("2009 Compliance Report"). The State Department explained that this position is supported by the conclusions of a Special Commission of the Hague Conference on Private International Law that reviewed the operation of the Convention in signatory states and concluded that return orders with "stipulations, conditions [or] undertakings" that are "limited in scope and duration," address "short-term issues," and remain "in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention." Special Comm'n, Conclusions and Recommendations of the Fifth Meeting of the Special Commission § 1.8.1 (2006), https://assets.hcch.net/upload/concl28sc5_e.pdf.

When *Blondin* was appealed to the Second Circuit a second time, the United States filed an amicus brief arguing that "the *court should look for ways to order return*" in grave-risk cases. *Blondin* Amicus Br. 7 (emphasis added). The Government emphasized that "it is important that a court consider not only whether return would subject the child to a grave risk of harm, but also whether the State to which the child would be returned can and will take steps to ameliorate any potential harms." *Id.* at 19. Such consideration "harmonize[s]" the grave-risk exception "with the Convention's central purpose of, *wherever possible*, deterring abductions by returning abducted children promptly." *Id.* (emphasis added). Return should have been ordered in *Blondin*, the Government argued, because it was possible to ameliorate the grave risk posed by the children's abusive father: the children "would not have to stay with their father pending the new [French custody] determination, . . . the French system could support [the children] pending the adjudication of the custody case, and . . . the French system could protect the children from further abuse." *Id.* 19–20.

Ms. Golan does not point to any instance before this case in which the State Department said that when a court makes a grave-risk finding, it can refuse to even consider whether measures proposed by the parties or available in the country to which the child would be returned can ameliorate the grave risk. Ms. Golan relies heavily on the State Department's initial legal analysis of the Convention in 51 Fed. Reg. at 10,510. But Ms. Golan's argument is based entirely on the fact that the publication "did not even mention" ameliorative measures. Pet. Br. 28; see also U.S. Merits Br. 16–18. Not mentioning ameliorative measures is not a position on whether or when they must be considered.

See *John Hancock Mut. Life Ins. Co.* v. *Harris Tr. & Sav. Bank*, 510 U.S. 86, 108 (1993).

The State Department's analysis was done before courts had begun to implement the Convention, and it did not purport to address the considerations that constrain and inform a court's exercise of discretion in grave-risk cases. See *Hague International Child Abduction Convention Text and Legal Analysis*, 51 Fed. Reg. at 10494-01. In *Blondin,* the Government addressed those considerations and stated that "issues of past abuse should not constitute a grave risk of future harm under Article 13(b) without the additional finding that there is a likelihood of, and no adequate option to prevent, future abuse upon return." *Blondin* Amicus Br. 21. The Government rejected as "flawed," the argument that the legal analysis in 51 Fed. Reg. at 10,510 allowed the court to deny return when there were ways to protect the children from harm. *Id.* at 22.

Ms. Golan's reliance on a 1995 letter from the State Department to the British government is also misplaced. Pet. Br. 29. While the letter offered that ameliorative measures were not "necessary to the proper operation of the Convention," it said their use is "clearly consistent with the Convention" when they "minimize the use of non-return orders based on Article 13." Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995), reprinted in U.S. Pet. Br. App. 1a–20a. The letter's criticism of ameliorative measures was directed to the *scope* of measures that went beyond ensuring that the child could safely return to the country of habitual residence until the courts there resolved the parents' custody dispute. See *id.* at 2a. The letter further said its analysis was "provisional[]" and subject to change

based on experience and considering international agreement and practice. *Id.* 8a, 11a. As discussed below, experience and international practice now both support considering ameliorative measures.

C. International Practice Supports Consideration of Protective Measures as Part of the Grave-Risk Analysis

1. "Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott*, 560 U.S. at 16 (quoting ICARA § 11601(b)(3)(B), codified 22 U.S.C. § 9001(b)(3)(B)); see also *Monasky*, 140 S. Ct. at 727; *Lozano*, 572 U.S. at 12–13. The Hague Conference on Private International Law's *Guide to Good Practice*—which was issued in 2020 "to promote, at the global level, the proper and consistent application of the grave risk exception in accordance with the terms and purpose of the 1980 Convention,"—says courts should consider ameliorative measures in grave-risk cases. *Guide* ¶ 3. The *Guide* explains that "where the court determines that there is sufficient evidence" of a grave risk, "it *must* nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm." *Id.* ¶ 41, (emphasis added); see also *id.* ¶ 59 ("[W]here the taking parent has established circumstances involving domestic violence that would amount to a grave risk to the child, courts should consider the availability, adequacy and effectiveness of measures protecting the child from the grave risk.").

The United States cites language stating that the "examination of the grave risk exception should . . . include, *if considered necessary and appropriate*, consideration" of ameliorative measures. U.S. Merits Br. 22 (quoting *Guide* ¶ 36) (emphasis added by the United

States). But that general description of the grave-risk analysis should not be read to negate the *Guide*'s specific instruction that courts use a two-step process in grave-risk cases that requires consideration of ameliorative measures. Specifically, "[a]s a first step, the court should consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk." *Guide* ¶ 40. If so, the court goes to step two and determines whether "the grave risk exception . . . has been established by examining and evaluating the evidence presented by the . . . [respondent], and by taking into account the evidence/information pertaining to protective measures available in the State of habitual residence." *Id.* at 31 ¶ 41; see also U.S. Merits Br. 22 (conceding that the *Guide* "lists evaluation of ameliorative measures as a necessary step in its section describing the grave-risk exception 'in practice'").

2. The United Kingdom utilizes the same approach. The Supreme Court there articulated a two-step inquiry that is similar to the Second Circuit's: (1) "Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk" of harm; and (2) "If so, the court must then ask how the child can be protected against the risk." Re E (Children) (Abduction: Custody Appeal), [2011] UKSC 27, [2012] 1 AC 144 ¶ 36 (appeal taken from Eng.) (emphasis added). Ireland and Jamaica have similar rules. A.S. v. P.S. (Child Abduction) [1998] 2 IR 244 (Ir.) (courts "must take account of the practical consequences of a [return] order and the effect of undertakings and of court proceedings in [the habitual residence]"). DW v. MB - [2020] JMSC Civ 230, ¶ 57, 59 (Jam. Nov. 19, 2020) (following opinions from the UK and Second Circuit).

Twenty-six EU member states also require consideration of ameliorative measures as articulated in the EU Regulation Brussels IIa. Council Regulation 2201/2003, art. 11(4), 2003 O.J. (L 338) 6 (EU).[12] In cases involving these member states, courts "*cannot* refuse to return a child on the basis of Article 13b . . . if it is established that adequate arrangements have been made to secure the protection of the child after his or her return." *Id.* (emphasis added).

Other Convention signatories consider ameliorative measures in determining whether a grave risk exists at all. See, *e.g.*, *LRR* v *COL* [2020] NZCA 209 at [75], [112] (N.Z.) (considering ameliorative measures "at the point the grave risk is being assessed," and concluding that "[i]f there is cogent evidence that return would expose the child to a grave risk of an intolerable situation, the court needs to consider whether protective measures can be put in place in the requesting State to protect the child from that risk."). And courts in numerous other signatory countries have alternatively considered ameliorative measures when exploring whether to exercise their discretion to return a child after the grave-risk exception was raised. See*, e.g.*, *DP* v. *Commonwealth Cent. Auth.* [2001] HCA 39 ¶¶ 40, 41 (Austl.); M v. E [2015] H.K.C.A. 252 ¶ 8.2 (H.K.) [INCADAT reference HC/E/CNh 1356]; *Thomson* v. *Thomson*, [1994] 3 S.C.R. 551, 555 (Can.); S. G., P. C. c/U., M. s/Exhorto Restitución (Uru. Dec. 22, 2016); CivA 4391/96 *Ro* v. *Ro* (1997) (Isr.) [INCADAT reference HC/E/IL 832]; Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 31 2015, no. 491 (Japan) [INCADAT reference HC/E/JP 1437]; Sec'y For *Justice* v. *Parker* 1999 (2) ZLR 400 (H) (Zim.).

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[12] European Union, *Country Profiles*, https://european-union.europa.eu/principles-countries-history/country-profiles_en?page=1.

3. While Ms. Golan and the United States contend that these authorities demonstrate that considering ameliorative factors is merely discretionary, in reality, the practice is that they *are* considered. And for good reason: any examination of the circumstances in grave-risk cases would be incomplete without the consideration of ameliorative measures. See Amicus Curiae Br. of the Am. Academy of Matrimonial Lawyers in Support of Neither Party, at 17 (a "risk assessment that refuses to consider the potential mitigation of risk is myopic and devalues the capacity of the child's native country to protect its citizens under its own laws"). Ms. Golan, the United States, and other Amici, cite no authority that adopts Ms. Golan's position that "ameliorative measures will almost never be appropriate" in domestic violence cases. Pet. Br. 17. Accordingly, adopting Ms. Golan's position would directly contravene Congress's direction for uniformity.

II. THE DISTRICT COURT'S RETURN ORDER SHOULD BE AFFIRMED

Ms. Golan's argument that the protective measures adopted by the district court were "[i]nappropriate [a]nd [i]nadequate" (Pet. Br. 43–47) is not properly before the Court and provides no basis for reversing or remanding the judgment. The argument is outside the scope of the question presented in the Petition. In addition, Ms. Golan contributed to the delay and asked the lower courts to impose the conditions that she argues are inappropriate under the Convention. Since then, the Court of Milan has issued an extensive order to protect B.A.S. and Ms. Golan upon their return to Italy, and it has scheduled briefing and a hearing on the custody dispute in June 2022. There is no valid reason to prolong these proceedings or refuse to return B.A.S. to Italy.

1. The Petition asked the Court to resolve a split in the circuits on the question "[w]hether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding." Pet. I. Mr. Saada opposed the Petition arguing, among other things, that this case was not an appropriate vehicle to resolve any split because the district court already determined that its ameliorative measures would allow the safe return of B.A.S. despite the grave risk finding. Br. in Opp. 1. Ms. Golan replied that this case is a good vehicle to resolve the split, because there is "no basis to presume" that the district court "would have reached the same result had it not been bound by Second Circuit precedent to consider ameliorative measures, including Italian court orders, after a finding of grave risk." Reply Br. 9. She also argued that if the Court were to resolve the question presented in her favor, the appropriate remedy would be to remand the case so the district court could exercise its discretion without a mandate to consider ameliorative measures. *Id.* at 10. She did not argue that the district court could not issue a return order on the facts of this case. Her current argument that "a remand would serve no valid purpose" and that this Court should "reverse the court of appeal's ruling, and allow for B.A.S. to remain with his mother in the United States," Pet. Br. 47, is therefore not one she "raised in seeking certiorari," *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992); see also Sup. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

2. In all events, B.A.S. should have been returned to Italy years ago, and there is no valid reason to reverse

the return order to remand this case for more proceedings.

a. The proceedings here would have been concluded within six months, and B.A.S. returned to Italy soon after, had Ms. Golan not appealed the district court's initial remand order. As noted above, *supra*, at 7, that return order was conditioned on Mr. Saada's agreeing to pay Ms. Golan $30,000 prior to the return of B.A.S. so she could obtain an apartment in an undisclosed location away from him and his family, and his promise to stay away from Ms. Golan during the custody proceedings in Italy, obtain behavioral therapy, and pursue dismissal of the criminal kidnapping charges. Pet. App. 84a. The Second Circuit reversed that return order because some of Mr. Saada's undertakings were not in a protective order enforceable in Italy. Pet. App. 27a–28a. The court announced a new rule in the Circuit that:

> [I]n cases in which a district court has determined that repatriating a child will expose him or her to a grave risk of harm, unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioning parent will comply with the undertakings and there are no other 'sufficient guarantees of performance.'

Pet. App. 34a (footnote omitted).

There is, however, no requirement that a protective order be issued in the country of habitual residence before a child may be returned. See *Guide*, ¶ 46 (acknowledging that protective measures may be "in the form of *voluntary* undertakings given to the court by the left-behind parent" (emphasis added)). Indeed, the Convention "recognized that when deciding on a child abduction case, the requested Judge should trust that

the Judicial authorities of the requesting state will take care of the due protection of the child, and where necessary the accompanying parent, once the child is returned." Hague Conference on Private International Law, *The Hague Project for International Co-operation and the Protection of Children*, at 1, ¶2 (Nov. 28–Dec. 3, 2005)[13].

The record and district court findings confirm that trust in the Italian authorities is appropriate here, and that Mr. Saada's agreement to stay away from Ms. Golan, combined with the payment of $30,000 so she could obtain an apartment in an undisclosed location away from him and his family, was sufficient to avoid a grave risk to B.A.S. As the district court explained, "eliminating the element of proximity" between Mr. Saada and Ms. Golan "will reduce the occasions for violence," and "ameliorate the grave risk to B.A.S. posed by Mr. Saada's violent behavior to Ms. Golan." Pet. App. 81a–82a. Indeed, there is no evidence that Mr. Saada has tried to harm Ms. Golan since she moved back to the United States with B.A.S., even though he has come to New York multiple times for court hearings and visits with B.A.S.[14]

Furthermore, the district court found, based on the testimony of lawyers who practice family law and represent victims of domestic violence in Italy, that the Italian legal system can "handle domestic violence cases involving children."[15] Pet. App. 68a–70a. The

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[13] Available at https://www.hcch.net/en/news-archive/details/?varevent=114

[14] Ms. Golan never sought a protective order from a U.S. court to prevent Mr. Saada from harming her when he came to the United States.

[15] The court specifically credited respondent's Italian law expert, finding she provided credible testimony "about the Italian

court also "reject[ed] Ms. Golan's claim that Mr. Saada and his family have some power over Italian law enforcement officials." Pet. App. 82a n.39. The Milan police responded when Ms. Golan called them following a dispute with Mr. Saada in 2017, and their "response was appropriate." *Id.* "The police did not arrest Mr. Saada, but Ms. Golan admitted that she did not want him arrested . . . ."*Id.* She also declined their offer to go to a hotel. Pet. App. 57a. The police then referred the matter to Social Services, which offered to place Ms. Golan in a safe house—an offer she likewise declined.[16] Pet. App. 58a.

The Second Circuit did not address any of these findings, and the district court did not commit clear error in finding that Mr. Saada's undertakings, combined with the protections of the Italian legal system, "ameliorate the grave risk of harm to B.A.S. upon his repatriation to Italy." Pet. App. 83a. Thus, the district court's first return order should have been affirmed, and B.A.S. returned to Italy nearly three years ago. See *Monasky*, 140 S. Ct. at 730 ("[C]lear-error review speeds up appeals and thus serves the Convention's premium on expedition."). Had that occurred, there would not have been the delay of which Ms. Golan now complains, or the protective order from the Italian

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legal system's ability to handle domestic violence cases involving children." Pet. App. 70a.

[16] Social Services conducted a months-long investigation and issued a report concluding "that 'the family situation entails a developmental danger for [B.A.S.],'" and referred the matter to the Public Prosecutor. Pet. App. 59a (citing Trial Ex. 5 at 7). The Public Prosecutor in Milan decided not to open a judicial proceeding "in light of the attested parents' collaboration" and availability "to engage in couples therapy with a professional," but requested that Social Services "continue monitoring the family situation." Trial Ex. 6.

court in the custody case that she thinks offends the Convention and ICARA. Pet. Br. 43–44.

b. Moreover, when the case was remanded to the district court, it was Ms. Golan who delayed in seeking a protective order from the Italian court and asked the district court to include conditions on the return order that extended well beyond what was necessary to ameliorate the grave risk to B.A.S.

On remand, the district court ordered the parties to seek a protective order from the Italian court by August 10, 2019. But Ms. Golan did not do so. Her Italian counsel was on vacation and could not attend a hearing in August. D. Ct. ECF No. 70 at 2. Then, at a hearing in September, Mr. Saada's counsel advised the Court of Milan that he agreed to an order requiring him to stay away from Ms. Golan and B.A.S. pending resolution of the custody case. D. Ct. ECF No. 81 at 1. But no protective order was issued because Ms. Golan's counsel said she was *not* requesting one. *Id.* Ms. Golan later advised the district court that she wanted the Italian court to order a broader order that extended to Mr. Saada's family, and she did not think that a request was "ripe" for decision until the entire record from this case was translated into Italian and sent to the court in Italy, D. Ct. ECF No. 82 at 1–2—a translation that would have cost Mr. Saada over $100,000. D. Ct. ECF No. 94 at 4. As a result, the district court had to issue another order directing the parties to seek a protective order in Italy. D. Ct. ECF No. 89 at 2. Ms. Golan finally requested a protective order at a hearing on December 10, 2019, and the Court of Milan granted it one week later. D. Ct. ECF No. 94 at 1; D. Ct. ECF No. 96 at 1; D. Ct. ECF No. 96-1

At that point, Mr. Saada urged the district court to allow the return of B.A.S. as soon as his passport was ready. D. Ct. ECF No. 96 at 3–4. Ms. Golan opposed

that request, and asked the court to entertain still more briefing on whether the Italian court order and the other ameliorative measures were sufficient to avoid the grave risk. *Id.* The district court granted her request, which added over four months of delay before the court issued the return order on May 5, 2020. Ms. Golan thus should not be heard to complain about the "lengthy process that the district court undertook" to issue the return order. Pet. Br. 43.

Ms. Golan's complaint that "the district court embroiled itself in custody-related issues of spousal support, child support, [and] visitation" also rings hollow. Pet. Br. 44. As noted, it was Ms. Golan who refused to promptly seek a protective order from the Italian court, and forced the district court to get involved in the parties' dispute. And it was Ms. Golan who asked the district court to order, as a condition of return of B.A.S., that Mr. Saada pay for things such as her personal therapy, tuition for a bilingual private school for B.A.S., private health insurance, Uber rides and public transportation, and trips to visit family in the United States and Israel. D. Ct. ECF No. 94 at 3; D. Ct. ECF No. 95 at 7–8. Such expenses are clearly not needed to mitigate the risk that B.A.S. might be exposed to domestic violence upon his return to Italy. If these expenses (or any other improper expenses) were included in the $150,000 that Mr. Saada needed to pay Ms. Golan before B.A.S. can be returned, the remedy is to relieve Mr. Saada of the burden of payment, not to refuse to return B.A.S.

Finally, Ms. Golan should not be heard to fault the district court for "order[ing]the parties to seek a protective order" with specific terms. Pet. Br. 44. As noted, it was Ms. Golan who wanted the Italian court order to include a broad range of terms and asked the district court to require Mr. Saada to agree to her terms as a

condition of the return of B.A.S. It was the Italian court that exercised its own judgment and did not simply rubber stamp an order proposed by the parties. It accepted some terms (*e.g.*, to stay away from Ms. Golan and B.A.S., except for supervised visitation with B.A.S. in a neutral environment), rejected others (*e.g.*, extending the order to Mr. Saada's family), and added terms not requested by either party (*e.g.*, placing B.A.S. under the supervision of Social Services and directing that Social Services evaluate B.A.S. and both parents and make recommendations about additional therapeutic or mental health intervention). D. Ct. ECF No. 96 at 2; D. Ct. ECF No. 96-1 at 6, 9–11. Equally important, the order was made by the Italian court that is presiding over the ongoing custody proceeding for B.A.S.—the very court that the Convention intends to resolve a dispute about the custody, visitation, care, and support of a child who has been wrongfully retained in a country that is not his habitual residence.

c. Given all that has taken place, it would serve no valid purpose to reverse and remand this case for further consideration by the lower courts, or to reverse with instructions that B.A.S. remain in the United States. The district court has already twice exercised its discretion to send the child back, finding both times that the conditions sufficiently ameliorated the risk to B.A.S. Pet. App. 12a, 83a–84a. A remand would only serve to "consume time when swift resolution is the Convention's objective." *Monasky*, 140 S. Ct. at 731.

It would also contravene the Convention and ICARA to reverse the return order "and allow B.A.S. to remain in the United States . . . pending a custody determination by an American court." Pet. Br. at 43. The Convention was adopted to address the situation where a person—usually a parent—removes or retains a child from his home country to try "to establish artificial

jurisdictional links on an international level," and "hopes to obtain a right of custody from the authorities of the country to which the child has been taken." *Explanatory Report* ¶¶ 11, 13. The Convention's drafters determined that an "effective way of deterring" such behavior "would be to deprive [it] of any practical or juridical consequence" by mandating "'the prompt return of children wrongfully removed to or retained in any Contracting State.'" *Id.* ¶ 16.

A ruling that B.A.S. must remain in the United States and his custody determined by an American court would reward Ms. Golan's wrongful removal and retention of B.A.S. and give her the very relief the Convention and Congress sought to prohibit. See 22 U.S.C. § 9001(a)(2) ("Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.").[17] The Italian court has already issued a comprehensive order to protect B.A.S. and

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[17] Ms. Golan also has no right, under the laws of New York, to have B.A.S.'s custody determined "by an American court." Pet. Br. 43. A New York court will treat a foreign country as if it were a state of the United States to resolve child custody jurisdiction and will recognize and enforce a foreign country's custody order if that custody order was made under factual circumstances in substantial conformity with the jurisdictional standards in the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). NY Dom. Rel. Law §5-A (75-D). Italy took jurisdiction, under its domestic law, in substantial conformity with the UCCJEA, because Italy was B.A.S.'s home state when the Italian custody proceeding began, NY Dom. Rel. Law §5-A (76). Thus, unless Italy terminates its proceeding, or stays its proceeding because New York is a more convenient forum, New York courts may not exercise jurisdiction to determine custody of B.A.S. NY Dom. Rel. Law §5-A (76-E). Indeed, the New York Family Court dismissed the custody petition Ms. Golan filed in August 2017 because it lacked jurisdiction. Pet. App. 46a.

Ms. Golan upon their return. See *supra*, at 14a. The court has appointed an attorney to represent B.A.S.'s interests in the custody dispute, and a hearing is set for June 9. The grave risk to B.A.S. has been sufficiently ameliorated, and it would offend the Italian court and violate the Convention to refuse to return B.A.S. to Italy immediately.

CONCLUSION

For the foregoing reasons, the district court's return order should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
KATHLEEN MUELLER
JILLIAN S. STONECIPHER
NICOLE M. BAADE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

RICHARD MIN*
MICHAEL BANUCHIS
GREEN KAMINER MIN & ROCKMORE LLP
420 Lexington Avenue
Suite 2821
New York, NY 10170
(212) 681-6400
rmin@gkmrlaw.com

MELISSA A. KUCINSKI
MK FAMILY LAW
1717 K St. NW, Ste. 900
Washington, DC 20006

Counsel for Respondent

*Counsel of Record

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